**YAP BAN TICK & 3 ORS.**

**v.**

**STANDARD CHARTERED BANK**

COURT OF APPEAL, KUALA LUMPUR
DATO' DR. ZAKARIA MOHD YATIM JCA
DATUK SHAIK DAUD HJ. MOHD ISMAIL JCA
DATO' MAHADEV SHANKAR JCA
[CIVIL APPEAL NO. N-08-139 OF 1994]
1 JULY 1995

***PRACTICE & PROCEDURE:*** *Appeal - Leave to file out of time - Time for appeal lapsed due to ignorance of solicitors and Court - Whether constituted special circumstance - Enlargement of time - Whether to be allowed - Rules of the High Court 1980, O. 56 r. 2 - Courts of Judicature Act 1964, s. 68.*

On 22 August 1994 the respondent bank obtained an Order 14 judgment for RM 2.4 million against the applicant. Thereupon the applicant instructed his solicitors to apply for further arguments in open Court. As of 26 June 1994, however, s. 68(2) Courts of Judicature Act 1964 (CJA) had been repealed with the result that, thereafter, all decisions of the High Court were appealable subject only to s. 68(1) and (3) of CJA. Thus, in this case, the applicant could have appealed against the summary judgment as of right, since the value of the subject matter was more than RM250,000.

Both the applicant's solicitor and the High Court Registrar were not aware of the repeal, and that being the case, the applicant's solicitor applied for and the Registrar allowed further arguments, to be heard on 6 October 1994. Meanwhile, on 3 October 1994, the bank's solicitors, having apparently realised the error, wrote to the applicant's solicitors stating that on 6 October 1994 they would be raising a preliminary objection that the Court had no jurisdiction to entertain the application. The appellant came to realise about the mistake only on 6 October 1994, when the application came up for hearing, but by then the time for filing the appeal had already lapsed. Hence this application for leave to file the appeal out of time.

**Held:**

**Per Shaik Daud Hj. Mohd Ismail JCA (Mahadev Shankar, Zakaria M. Yatim JJCA concurring):**

**[1]** The delay here was caused not only by the ignorance of the law of the solicitors but also of the Court. The ignorance or even carelessness of the solicitor, and in this case compounded by the Court itself, ought not to be visited upon the applicant. The applicant therefore ought not to be deprived of his right to appeal.

**Per Mahadev Shankar JCA:**

**[1]** In the present case if the bank's solicitors knew of the error they were clearly under the duty to correct the misconception in the mind of both the Judge and the Registrar. They did not do so until after the time for appeal expired on 22 September 1994.

**[2]** The material before the Court leaves the possibility open that the bank's solicitors only realised the error on or about 3 October 1994 in which case they too must be faulted at the very least for ignorance.

**[3]** It is impossible to provide a universal definition of what constitutes "special circumstances". In the present case whilst there was no excuse for the mistake made by the

applicant's solicitors, there was equally no excuse for the conduct of the bank's solicitors in omitting to point out to the Registrar that she was doing something the law did not allow. Leave to appeal, therefore, ought to be allowed.

*[Application allowed. Applicant given 7 days to file and serve notice of appeal]*

[**Bahasa Malaysia** Translation of Headnotes]

***AMALAN & PROSEDUR:*** *Rayuan - Kebenaran untuk memfailkan di luar jangka waktu - Tempoh rayuan telah luput disebabkan kejahilan peguamcara dan Mahkamah - Samada membentuk satu keadaan istimewa - Perlanjutan masa - Samada harus dibenarkan - Kaedah-kaedah Mahkamah Tinggi 1980 A. 56 k. 2 - Akta Mahkamah Kehakiman 1964 s. 68.*

Pada 22 Ogos 1994 bank responden telah mendapatkan penghakiman Aturan 14 sebanyak RM2.4 juta terhadap pemohon. Berikutan itu pemohon telah mangarahkan peguamcaranya supaya memohon untuk membuat hujahan lanjut di Mahkamah terbuka. Walaubagaimanapun, berkuatkuasa daripada 26 Jun 1994, s. 68(2) Akta Mahkamah Kehakiman 1964 (CJA) telah dibatalkan yang mana menyebabkan, selepas daripada itu, kesemua keputusan Mahkamah Tinggi boleh dirayui tertakluk hanya kepada s. 68(l) dan (3) CJA. Dengan yang demikian, dalam kes ini, pemohon boleh merayu terhadap penghakiman terus tersebut sebagai satu hak, oleh kerana nilai hal-perkara adalah lebih dari RM250,000.

Kedua-dua peguamcara pemohon dan Pendaftar Mahkamah Tinggi tidak menyedari tentang pembatalan di atas, dan oleh yang demikian, peguamcara pemohon telah memohon untuk mendapatkan, dan Pendaftar membenarkan, hujahan lanjut untuk didengar pada 6 Oktober 1994. Sementara itu, pada 3 Oktober 1994, peguamcara bank, barangkali setelah menyedari kesilapan tersebut, telah menulis kepada peguamcara pemohon menyatakan bahawa pada 6 Oktober 1994 mereka akan membangkitkan bantahan awal bahawa Mahkamah tidak mempunyai bidangkuasa untuk melayan permohonan tersebut. Perayu menyedari kesilapan itu hanya pada 6 Oktober 1994, bilamana permohonan tersebut tiba untuk perbicaraan, tetapi pada waktu itu tempoh masa bagi memfailkan rayuan telahpun luput. Maka itulah permohonan dibuat di sini untuk kebenaran bagi mamfailkan rayuan di luar tempoh masa.

**Diputuskan:**

**Oleh Shaik Daud Hj Ismail HMR (Mahadev Shankar, Zakaria M. Yatim, HHMR menyetujui):** Kelewatan di sini telah disebabkan bukan sahaja kejahilan peguamcara mengenai undang-undang tetapi juga kejahilan Mahkamah. Kejahilan atau pun kecuaian peguamcara dan dalam kes ini dikompaunkan oleh Mahkamah sendiri, tidak seharusnya diletakkan pada pemohon. Pemohon dengan itu tidak seharusnya dilucuthak untuk merayu.

**Oleh Mahadev Shankar HMR:**

**[1]** Dalam kes semasa ini, jika peguamcara bank mengetahui tentang kesilapan itu, mereka adalah dengan jelasnya berkewajipan untuk membetulkan salah-anggap dalam fikiran kedua-duanya Hakim dan Pendaftar tersebut. Mereka tidak melakukannya sehingga selepas tempoh bagi rayuan luput pada 22 September 1994.

**[2]** Material yang ada di hadapan Mahkamah mendedahkan kemungkinan bahawa peguamcara bank hanya menyedari kesilapan tersebut pada atau lebihkurang 3 Oktober 1994 dan oleh itu mereka juga haruslah dipersalahkan sekurang-kurangnya atas kejahilan.

**[3]** Ianya adalah mustahil untuk memberikan takrifan universal mengenai apakah yang membentuk "special circumtances" (keadaan-keadaan khas). Dalam kes semasa, sementara

tidak terdapat alasan bagi kesilapan yang telah dibuat oleh peguamcara pemohon, begitu juga tidak terdapat alasan bagi kelakuan peguamcara bank kerana terlupa untuk menunjukkan kepada Pendaftar bahawa beliau telah melakukan sesuatu yang tidak dibenarkan oleh undang-undang. Kebenaran untuk merayu, dengan itu, seharusnya dibenarkan.

*[Permohonan dibenarkan. Pemohon diberikan 7 hari untuk memfailkan dan menyampaikan notis rayuan]*

**Cases referred to:**
*Bozson v. Altrincham U.D.C. [1903] 1 KB 54* ***(refd)***
*Haron bin Mohd. Zaid v. Central Securities (Holdings) Sdn. Bhd. [1982] 2 MLJ* ***(refd)***

**Legislations referred to:**
Rules of the High Court 1980, O. 14, O. 18 r. 19, O. 56 r. 2
Courts of Judicature Act 1964, s. 68

*For the applicant: Malik Imtiaz; M/s Raja, Darryl & Loh*
*For the respondent: D. Krishnan; M/s Lee Boo Pang & Co*

**JUDGMENT**

**Shaik Daud Hj. Mohd Ismail JCA:**

By way of a notice of motion dated 20 October 1994 the applicant Yap Ah Peng @ Yap Aun Ping (the 4th defendant in the Seremban civil suit no. 22-49-1992) applies for an extention of time of 14 days to file and serve a notice of appeal on the respondent Standard Chartered Bank.

On 22 August 1994 Standard Chartered Bank had entered summary judgment under O. 14 Rules of the High Court 1980 by way of a summons in chambers dated 22 July 1993. What ensued after that appeared to be rather odd. In his affidavit in support of the application for the enlargement of time, sworn by the applicant himself on 24 October 1994, he deposed that after the O. 14 judgment was entered against him, he instructed his solicitors to apply for further arguments in open Court. He took this course of action no doubt after being advised by his solicitors who apparently had in mind the provisions of the repealed s. 68(2) Courts of Judicature Act 1964, which provides that:

> (2) No appeal shall lie from an order made by a Judge of the High Court in chambers unless the Judge has certified, after application, within four days after the making of the order by any party for further argument in Court, that he requires no further argument, or unless leave is obtained from the Supreme Court or from a Judge of the High Court.

It is unfortunate that the solicitor concerned was unaware that the above provisions was repealed with effect from 24 June 1994 with the setting up of the Court of Appeal, whereby all application pertaining to appeals has to be made to the Court of Appeal. It is more unfortunate that the Seremban High Court allowed the application for further arguments in open Court. This is evidenced by a letter from the Court dated 6 September 1994 issued by the Senior Assistant Registrar which in fact set down 6 October 1994 as the date for the further arguments. It may be acceptable though not excusable for solicitors not to be aware of the amendment but I find it extremely unacceptable and inexcusable for the High Court to be equally unaware. It would appear that it was only on 6 October 1994 the actual date of hearing that everyone suddenly woke up and became aware of the amendments. By this time it became obvious that the time for filing the appeal was over, hence this application. In this case since the amount of the claim is RM2.4 million, no leave to appeal is required.

There was no affidavit filed by the respondent to either oppose or to produce evidence to the contrary. At the hearing of the application on 21 November 1994 both sides were represented by Counsel but Counsel for the respondent raised no objections to the application. In fact this delay was caused not only by the ignorance of the law of the solicitors but also it seems of the Court. Therefore it is my view that the applicant ought not to be deprived of his right to appeal, the ignorance or even carelessness of the solicitor and in this case compounded by the Court itself ought not to be visited upon the litigant. Since this unfortunate event took place only a short while after the amendment and establishment of the Court of Appeal, the application ought to be allowed. In the circumstances, we exercised our discretion and allowed the application and the applicant given 7 days to file and serve the notice of appeal.

**Mahadev Shankar JCA:**

At first sight it could be suggested that in giving this applicant leave to appeal, we departed from the general principle that a mistake of Counsel is not a special circumstance for enlarging the time for filing an appeal, but this case is a decision on its own facts.

The Standard Chartered Bank (the bank) had lent RM2.4 million to Ang Chuan Sdn. Bhd. by way of a fixed loan and RM5 million by way of end financing. The applicants "the guarantors" guaranteed repayment. The borrower defaulted. The bank sued the guarantors.

In response to the statement of claim the guarantors filed a defence and counterclaim. The bank then applied by way of a summons in chambers:

(i) to strike out the defence and counterclaim under O. 18 r. 19;

(ii) for summary judgment under O. 14.

This summons was dated 22 July 1993. Several affidavits were filed in support and against the application followed by written submission from both sides in June and July 1994. The last appearance of Counsel was in chambers on 18 July 1994 when judgment was reserved.

On 22 August 1994 the Judge made an order striking out the defence and counterclaim and gave leave to enter judgment against the guarantors for RM2.4 million plus interest and costs.

At this point I must refer to the procedure provided for appeals against an order made in chambers.

Order 56 r. 2 of the Rules of the High Court 1980 (the Rules) provided for appeals from a Judge. Rule 2(l) stipulated that such appeals should be subject to s. 68 of the Courts of Judicature Act 1964 (the Act).

By P.U.(A)223/80 the old r. 2(2) provided that any party dissatisfied with any order made by chambers could apply in writing to the registrar within four days of the order for further argument. The Judge could then certify he needed no further argument or he could hear further argument, and set aside the order made in chambers or make such other order as he thought fit.

On 6 July 1993 by P.U.(A) 192/93 O. 56 r. 2 was substituted by the following:

> 2. Subject to the provisions of s. 68 of the Act any party may appeal against any judgment, order or decision made by a Judge in chambers.

At the time s. 68(2) of the Act read as follows:

> No appeal shall lie from an interlocutory order made by a Judge of the High Court in chambers unless the Judge has certified, after application, within four days after the making of such order by any party for further argument in Court., that he requires no further argument or unless leave is obtained from the Federal Court or from a Judge of the High Court.

What should be noted is that the order and the judgment entered on 22 August 1994 were not interlocutory orders but final orders against which the guarantors could have appealed straightaway, even if s. 68(2) of the Act had been perpetuated. *Bozson v. Altrincham U.D.C.* [1903] 1 KB 54 was applied in the Federal Court in *Haron bin Mohd. Zaid v. Central Securities (Holdings) Sdn. Bhd.* [1982] 2 MLJ. This decision is well known in legal circles in Malaysia.

The set-up of our Courts underwent a major change in 1994. By Act A 909/95 the Court of Appeal was established, as on 24 June 1994. Section 68(2) of the act was deleted. All decisions of a High Court Judge were appealable subject to the provisions of s. 68(l) and (3). Since leave was only required if the value of the subject matter was less than RM250,000, the guarantors could have appealed as of right under the new provision also.

Instead the guarantors' solicitors wrote a letter to the Registrar the very same day the decision was given i.e. 22 August 1994. The letter is headed request for further argument in open Court under s. 68(2) of the Act and O. 56 r. 292) of the Rules.

This letter was copied to the bank's solicitors, who did not respond.

On 6 September 1994 the Registrar wrote to the guarantors' solicitors referring to their letter dated 22 August 1994 and stated that the case had been fixed for further argument in open Court on 6 October 1994 at 9.00 a.m. and that the hearing will be proceeded with and judgment given even if the parties were absent. The same letter was sent to the bank's solicitors, who still did not respond.

1 think that this is an opportune moment to remind myself of what the Lord Chancellor, Lord Kilmuir said in September 1957 when he addressed the Faculty of Law of the University of Malaya, on "The importance of the study of law and the legal profession in a democratic community". He said (*inter alia*):.

> From what I have said, it is obvious that in my opinion, the legal profession has great power and therefore great responsibility. We must never forget that the lawyer has a double loyalty - to his client and to the law. He must do his utmost for the one but never at the expense of the other. **There are many occasions in practice when it would help the client** to ignore an inconvenient letter, **not to correct a misconception in the Judge's mind**, or to suppress an adverse authority. It must never be done, because if the legal profession ceases to enjoy the confidence of the State, the State can no longer afford to abide by the Rule of Law, and democracy will perish.
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> [See [1957] MLJ Ivii]. (Underlining supplied).

In the present case **if** the bank's solicitors knew of the error aforesaid they were clearly under the duty to correct the misconception in the minds of both the Judge and the Registrar that the law was as it was stated in the guarantors' solicitors' letter. They did not do so until after the time for appeal expired on 22 September 1994. On 3 October 1994 the bank's solicitors faxed the guarantors' solicitors and posted a letter to say that on th 6th (i.e. only 2 clear days before the hearing) they would raise a preliminary objection at the hearing that the Court had no jurisdiction to entertain the application. The material before me leaves the possibility open that the bank's solicitors only realised the error on or about 3 October 1994 in which case they too must be faulted at the very least for ignorance.

I have not been supplied with a note of what transpired on 6 October 1994 before the learned Judge, or what order was made on that day. Obviously the Judge's direction for further argument, and the Registrar's letter which was issued in pursuance thereof were wholly misconceived but how was it vacated? Did it occur to the parties that it was debatable whether an order made without jurisdiction was still an order until it was set aside. Some nullities are voidable not void, and even if void have to be declared so.

The next step in this exercise was the present application for leave to appeal out of time. The guarantors' affidavit in support does not explain satisfactorily how the guarantors' solicitors made such a colossal blunder. The lengthy written submission filed in the Court below was relied upon to show merits. The motion was filed on 26 October 1994. It was fixed for hearing on 21 November 1994.

I have not been told when it was served on the bank's solicitors. The solicitor who had the conduct of this matter did not file his affidavit in reply until 16 November. In essence all it states is that the mistake of the guarantors' solicitors is not a good excuse and there were no merits in the proposed appeal. The lengthy written submissions filed in the High Court were attached in support. Obviously there is an arguable appeal here.

It is impossible to provide a universal definition of what constitutes "special circumstances". In the present case whilst there was no excuse for the mistake made by the guarantors' solicitors what excuse was there for the conduct of the bank's solicitors in omitting to point out to the registrar that she was doing something the law did not allow?

In my view none whatsoever. I therefore agreed that leave to appeal be granted.

**Zakaria M. Yatim JCA:**

I have read the judgments of my brother Shaik Daud JCA and Mahadev Shankar JCA and I entirely agree with their judgments.